INTERIOR BOARD OF INDIAN APPEALS

Estate of Evelyn Westwolf Mosney Bear Walker Romero

12 IBIA 215 (03/27/1984)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF EVELYN WESTWOLF MOSNEY BEAR WALKER ROMERO

IBIA 83-21 Decided March 27, 1984

Appeal from an order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian probate number IP BI 210D 80.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Generally--Indian Probate: Wills: Undue Influence

   The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

2. Indian Probate: Wills: Testamentary Capacity: Generally

   To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Furthermore, the evidence must show that this condition existed at the time of the execution of the will.

3. Indian Probate: Wills: Undue Influence

   To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

APPEARANCES: Mark A. Suagee, Esq., Havre, Montana, for appellant; Steven L. Bunch, Esq., Helena, Montana, for appellees. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On March 18, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Eric James Mosney (appellant), who sought review of a

January 18, 1983, order issued by Administrative Law Judge Keith L. Burrowes denying rehearing in the estate of Evelyn Westwolf Mosney Bear Walker Romero (decedent). The denial of rehearing let stand a February 23, 1982, order approving decedent's will and allowing distribution of her estate in accordance with its terms. For the reasons discussed below, the Board affirms that decision.

Background

Decedent, Blackfeet Allottee No. 1160-1/2A, was born April 20, 1926, and died in Browning, Montana, on July 14, 1979, at the age of 53. Hearings to probate her Indian trust estate were held on June 11, November 6, and November 21, 1980, by Administrative Law Judge Alexander H. Wilson. 1/

Testimony at those hearings and the family history data maintained by the Bureau of Indian Affairs (BIA) showed that decedent married Elmer Joseph Mosney on March 2, 1944, and that they had one child, Eric James Mosney, appellant here. Although decedent and Mosney separated, they were never divorced. Mosney died on January 27, 1971. Decedent subsequently lived with both Joseph Bear Walker and Ramon Romero, both of whom predeceased her. Decedent and Bear Walker had two children, Marion Louise Bear Walker and Louella Ann Westwolf. Decedent had three other children whose fathers were not known: Doris Mae Westwolf, Robert Mosney, and Francina Celeste Mosney. Robert died shortly after birth. Because of decedent's chronic problem with alcohol, Marion, Louella, and Doris were adopted by Robert Walter and Betty Jewell Wolk. Marion and Louella's last names were changed to Wolk, and Doris' name was changed to Nancy Jewell Wolk. Francina was also adopted.

Decedent had minimal contact with most of her children. Appellant left home in 1958, returning at irregular intervals. He apparently had no personal contact with decedent from 1967 until 1977. Following their adoptions, the other children likewise had little or no contact with decedent until 1975.

According to the testimony, decedent spent considerable amounts of time in the home of her brother, George Westwolf. While there decedent became acquainted with George's four children, two of whom, Arthur Thomas and Gloria Rose (appellees here), became her favorites. Decedent gave these two individuals special presents during her lifetime.

At the probate hearing BIA produced a document, executed on August 22, 1974, purporting to be decedent's will. The document specifically disinherited decedent's children, without mentioning Francina, 2/ stating that they had all been adopted out and she did not consider them her children. The will left all decedent's property to her niece and nephew, Arthur Thomas and Gloria Rose Westwolf. Decedent's children contested the will on the grounds that other of decedent's relatives had taken advantage of her drinking problem and had used undue influence to procure a will contrary to her desires.

1/ Administrative Law Judge Wilson retired before issuing a decision in this estate. The matter was reassigned to Administrative Law Judge Keith L. Burrowes.

2/ Francina was still a minor when the hearings into decedent's estate were held and did not attend the proceedings.

On February 23, 1982, Administrative Law Judge Burrowes issued an order approving decedent's will. The Administrative Law Judge found that there was insufficient proof that the will had been executed under undue influence.

Decedent's son and daughter, Eric and Marion, sought rehearing, basically alleging that decedent lacked testamentary capacity when the will was executed. Rehearing was denied by order dated January 18, 1983, which found that the evidence of decedent's mental capacity in and after 1975, and the conjecture that her capacity might have been diminished before 1975, was insufficient to overcome the testimony of the will scrivener and witness that decedent appeared totally competent on August 22, 1974, the date the will was executed.

Eric Mosney appealed this decision. Briefs were submitted by appellant and Arthur and Gloria Westwolf.

Discussion and Conclusions

[1] The burden of proving either undue influence or lack of testamentary capacity is on the person contesting the will. Estate of Samuel Tsoodle, 11 IBIA 163 (1983); Estate of Asmakt Yumpquitat (Millie Sampson), 8 IBIA 1 (1980).

[2] To invalidate a will for lack of testamentary capacity, the evidence must show that, at the time of the execution of the will, the testator did not know the natural objects of his bounty, the extent of his property, or the desired distribution. Tsoodle, supra. Appellant's evidence shows that decedent's longstanding problem with alcohol apparently diminished her mental capacity in later years. That evidence, however, relates almost exclusively to times after the execution of the will. The only evidence presented as to decedent's mental capacity before the will was executed was of a single incident in 1973 when decedent stayed with her daughter Marion for a few months while recuperating from injuries inflicted upon her in the course of a domestic altercation, an undoubtedly traumatic period for decedent. Following this incident, Marion did not see decedent again until 1975.

In contrast, the testimony and affidavits of the will scrivener and witnesses show that on the day the will was executed decedent was sober; knew that she owned property, although perhaps not the exact acreage and value; knew that her children were the natural objects of her bounty; 3/ and knew

---

3/ Decedent's will states that appellant was adopted out just as were his sisters. The evidence in the record, however, indicates that appellant had not been adopted out. Appellant testified that he was in a foster home for several years, and that decedent knew the difference between foster homes and adoption. There is no other evidence of the decedent's knowledge regarding this matter. In addition, appellant did not see decedent for a 10-year period. Under these circumstances, it is reasonable and understandable that decedent might conclude appellant had been adopted out.

The will also does not list Francina as decedent's child. Such an omission is not fatal to an Indian will. See Estate of Frank (Francis) Keahtigh, 9 IBIA 190 (1982). To the extent that this omission is raised to show that decedent did not know the natural objects of her bounty, it should

how she wished her property to descend. Appellant's evidence is insufficient to sustain a finding that decedent's mental abilities were so reduced that she lacked testamentary capacity when the will was executed.

[3] In regard to appellant's contention that decedent was acting under undue influence, the Administrative Law Judge found that one of the elements necessary to support a finding of undue influence was present in this case: the decedent was susceptible to influence. However, he found no evidence that decedent was acting under the influence of another at the time of the testamentary act; that anyone had, in fact, influenced her; or that the disposition was contrary to her wishes. Each of these four elements must be present to support a finding of undue influence. See Yumpquitat, supra; Estate of Hiemstennie (Maggie) Whiz Abbott, 4 IBIA 12, 82 I.D. 169 (1974); Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234 (1971). Upon a thorough review of the record, the Board agrees with the Administrative Law Judge's findings.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 23, 1982, decision of Administrative Law Judge Burrowes is affirmed.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Bernard V. Parrette
Chief Administrative Judge

//original signed
Anne Poindexter Lewis
Administrative Judge

---

fn. 3 (continued)
be noted that decedent had not seen Francina since the child was approximately 1-1/2 years old, almost 10 years earlier. The Board declines to find that the failure to list Francina in the will is sufficient to prove that decedent lacked testamentary capacity.